IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN ADAIR d/b/a A & B AUTOMOTIVE — PLAINTIFF

vs. — Civil Action No. 3:93cv132-D-D

HAROLD BELL, individually
and in his official capacity
as Chief of Police, and the
TOWN OF BYHALIA, MISSISSIPPI — DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the defendant Harold Bell for an entry of summary judgement in his favor.[1] Finding that there exist genuine issues of material fact with regard to the plaintiff's claims, the motion of the defendants will be denied.

FACTUAL BACKGROUND[2]

The plaintiff John Adair operates an automotive repair shop within the town limits of Byhalia, Mississippi, and has done so for several years. Adair had several automobiles located on his property which he states were used for the purposes of repair in the course of his auto repair business. On July 20, 1992, the attorney for the Town of Byhalia, Rook Moore, sent a letter to John Adair which read in part:

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[1] Defendant Town of Byhalia joins in this motion.

[2] When determining whether summary judgment is appropriate, the facts are determined by drawing all reasonable inferences in the light most favorable to the non-movant. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). The facts in this case are so viewed by the court for the purposes of this motion.

> The Mayor and Board of Aldermen have instructed me to write you concerning the abandoned vehicles, litter, junk and debris situated upon the premises owned and occupied by you on the south side of Old U.S. highway 78 in the Town of Byhalia.
>
> The occupancy and use of the subject premises by you constitutes a violation of the Town of Byhalia Zoning Ordinance and also constitutes a public nuisance.
>
> The town officials would like this matter handled amicably, to the end that the aforementioned junk be cleared from your lot forthwith.
>
> The Mayor and Board of Aldermen meet on August 4, 1992 at 7:00 o'clock p.m. and if this request has not been honored by you or some agreement reached as to when the junk will be removed, then the town has instructed me to remedy the situation through court action.

After receipt of this letter, Adair removed various car parts which had been located in front of his business but did not remove any vehicles from his property. There was no further communication between Mr. Adair and the town officials regarding this matter for the next several months. On December 15, 1992, Defendant Police Chief Harold Bell and Town Superintendent Trent Johnson arrived at Adair's property and conducted an inspection. Neither Bell nor Johnson possessed a search warrant for the inspection. Adair contends that Bell and Johnson informed him that by keeping the vehicles on his property, Adair was in violation of a new town ordinance[3], and that Adair should remove the cars from his property within ten days. Later that evening, the Byhalia Board of Aldermen passed the "Junk Car Ordinance," which in effect prohibited the

[3] Johnson states in his deposition that he was intending to discuss the situation on Adair's property as a violation of the Byhalia Zoning Ordinance.

possession or placement of "junked motor vehicles"[4] on any property located within the town limits of Byhalia.[5] The Junk Car Ordinance was not to take effect, however, until January 15, 1993.

Adair removed or had removed several of the vehicles on his property. On the day that the ordinance did take effect, January 15, 1993, both Bell and Johnson returned to Adair's place of business. Adair states that bad weather and a leg injury had prevented him from removing all of the vehicles, and urges that he informed Bell and Johnson of this fact. Bell and Johnson again told Adair that he was in violation of the town zoning ordinance and that he had to remove all the vehicles from his property.

On Friday, January 29, 1993, there were several vehicles still present on the Adair property, numbering somewhere between ten (10) and sixteen (16). Defendant Bell obtained an affidavit of arrest from the Byhalia Municipal Court and subsequently arrested Adair for violation of the Junk Car Ordinance. Adair was released on his own recognizance, and appeared in Municipal Court on Wednesday, February 3, 1993. Adair has argued that there was no prosecutor at this appearance, and that the judge conducted the entire proceeding

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[4] The ordinance defines a "Junked Motor Vehicle" as "any motor vehicle . . . which does not lawfully affixed thereto both an unexpired license plate [or] [sic] plates and a current motor vehicles safety inspection certificate, and the condition of which is wrecked, dismantled, partially dismantled, inoperative, abandoned or discarded."

[5] It is the opinion of this court that the "Junk Car Ordinance" very likely constitutes a zoning ordinance itself. While the issue is not properly before this court, the court is nonetheless curious as to whether all of the requirements under Mississippi law for the proper enactment of such an ordinance have been met. See, e.g., Miss. Code Ann. § 17-1-1, et. seq.

by taking on the role of prosecutor as well[6]. During this first court appearance, Byhalia Municipal Court Judge Ralph Doxey found Adair guilty of violating the Junk Car Ordinance, and gave Adair a fine of $175.00 per day per violation.[7] However, the fine was to be suspended if Adair had his lot clear of vehicles by March 3, 1993. Adair did remove the remaining vehicles from his lot, and after appearing in court again on March 3, 1993 paid a fine consisting of court costs totalling $37.50. While persons have been issued warnings that they were in violation, to this date no person other than the plaintiff has ever been arrested or convicted for a violation of the Junk Car Ordinance.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). After a proper motion for

[6] The defendants argue that this is based upon facts not in evidence, and should not be considered by the court. However, the defendants fall short of denying the truth of the matter.

[7] As to the fine, the ordinance states that "[a]ny person . . . violating this ordinance, upon conviction thereof, shall be fined not less than five ($5.00) dollars not more than fifty ($50.00) dollars for each offense, and each day of continued violation shall constitute a separate offense."

summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992). If the non-movant sets forth specific facts in support of allegations essential to his claim, a genuine issue is presented. Celotex, 477 U.S. at 327, 106 S.Ct. at 2554. "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. and Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the non-moving party. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992).

DISCUSSION

I. THE PLAINTIFF'S CLAIMS

After a reading of the matters submitted to this court, it is apparent that the plaintiff is asserting the following claims:

1) violation of his right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution; and

2) violation of his right to procedural due process as guaranteed by the Fourteenth Amendment to the United States Constitution;

3) violation of his right to be protected from illegal search and seizure as guaranteed under the Fourth Amendment to the United States Constitution.

The plaintiff has requested as damages: 1) monetary relief, 2) declaratory relief proclaiming that the Byhalia Junk Car Ordinance is unconstitutional as applied to him, and 3) injunctive relief

ordering that his conviction for violation of the ordinance be expunged from his record. The proper mechanism for the enforcement of these rights is 28 U.S.C. § 1983, and the law surrounding this statute is the proper course under which to proceed.[8]

II. THE PLAINTIFF'S STANDING TO SEEK RELIEF

The defendants challenge the plaintiff's standing to seek declaratory and injunctive relief, and cite as authority a relatively recent Fifth Circuit decision. Johnson v. Moore, 958 F.2d 92 (5th Cir. 1992) (denying standing to plaintiff who could show "only a distantly speculative possibility that he will again be subjected to the practice he complains of."). The plaintiff responds by stating that the defendants misunderstand his request for relief. The plaintiff notes that he is not seeking relief to protect him from future prosecution, as did the plaintiff in Johnson, but that he seeks to have all records of his conviction expunged. "Past exposure to illegal conduct does not in itself show a present case or controversy [supporting standing for injunctive relief] . . . if unaccompanied by any continuing, present adverse effects." Johnson, 958 F.2d at 94 (quoting O'Shea v. Littlejohn, 414 U.S. 488, 495-96, 94 S.Ct. 669, 675-76, 38 L.Ed.2d 674 (1974)). In the case at bar, Adair seeks relief from past alleged illegal activity, and if obtained illegally, his

[8] The plaintiff states in his complaint that jurisdiction is proper in this court under 28 U.S.C. § 1343. This is correct, but § 1343 does not completely confer proper jurisdiction to this court over a civil rights action. This section and 42 U.S.C. § 1983 were meant to be, and are, complementary. Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 96 S.Ct. 2264, 426 U.S. 572, 49 L.Ed.2d 65 (1976).

criminal record will be sufficient to stand as a present adverse effect of the past illegality. This court agrees that if the plaintiff prevails on his claims, he indeed has standing to request such relief.[9]

III. MERITS OF THE PLAINTIFF'S CLAIMS

A. PROCEDURAL DUE PROCESS

The plaintiff alleges that the defendants did not sufficiently afford him with notice and a hearing prior to the enforcement of the Byhalia Junk Car Ordinance. The first inquiry in any due process claim is whether the claimant has suffered a deprivation of a protected interest: life, liberty or property. U.S. CONST. Amend xiv, § 1. The parties are in agreement that Mr. Adair had both liberty and property interests at stake in this case, and the court need not dwell on the matter. The parties are also in agreement that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656-67, 94 L.Ed. 865 (1950).

a. NOTICE

In support of his claim that the notice requirement of due process was not met, the plaintiff argues that the notice requirements contained in the Junk Car Ordinance itself were not complied with. Further, the defendants concede that these

[9] However, the relief which the plaintiff seeks might also be achieved through the exercise of pendent jurisdiction by this court over Mississippi law. E.g., Miss. Code Ann. § 21-23-7 (1994).

requirements were not followed, but contend that they were inapplicable to the plaintiff's case.[10] The defendants also correctly note that even if the notice requirements were applicable to Mr. Adair under the ordinance, the failure to follow those requirements does not constitute a *per se* violation of due process. Smith v. Picayune, 795 F.2d 482, 488 (5th Cir. 1986); Stern v. Tarrant County Hospital Dist., 778 F.2d 1052, 1056 (5th Cir. 1985); Jackson Court Condominiums, Inc. v. New Orleans, 665 F.Supp. 1235, 1241 (E.D. La. 1987). "The right to have state (or city) laws obeyed is a state, not a federal, right." Jackson Court, 665 F.Supp. at 1241 (quoting Love v. Navarro, 262 F.Supp 520, 523 (C.D. Cal 1967)). While this fact if true might be of assistance in a state court appeal of his conviction, this contention of the plaintiff is without merit in this context of his § 1983 due process claim.

What is required by the United States Constitution so that minimal notice requirements are met is that notice be appropriate to the nature of the case. The question then, is whether the notice given was appropriate to the nature of this case. Mr. Adair was arrested on a Friday. He was given notice of the ordinance with which he was charged and given both oral and written notice of a trial date set on the following Wednesday. The charge was a misdemeanor. The only authorized and possible criminal punishment

[10] It is the defendant's position that the notice requirements of the ordinance only apply when the city is to seize a "junk" car and attempt to sell it at public auction. They contend that the mere arrest for violation of the ordinance requires no such notice.

pursuant to the ordinance was a fine, and there was no threat of imprisonment. While Judge Doxey directed Adair to remove the vehicles from his property in order to have his fine remitted, this court cannot find anything in the record to indicate that the town threatened to seize the vehicles on Adair's lot or that the town took any action to do so. Mr. Adair had the opportunity to take an appeal of his conviction, where it would have received de novo review. It appears to the court that Mr. Adair should have been given more than five (5) days notice of his trial (two days of which were the weekend), and thereby allowed more time to prepare. However, this court cannot say that as a matter of law this notice was insufficient because of an expedited time frame. Notice by arrest and service of an arrest affidavit is common for many violations and subsequent deprivations of interest, and is generally sufficient under most circumstances with regard to a misdemeanor infraction, including the one at bar.

b. HEARING

It is apparent from a reading of the plaintiff's submissions to this court that he alleges a deprivation of his interests under the due process clause prior to the Municipal Court hearing on February 3, 1993. The defendants contend that any deprivation of interests that the plaintiff has suffered occurred after this Municipal Court hearing. The only potential interest deprivation occurring before the municipal court hearing which is relevant to due process would have been Adair's arrest and the correlative loss

of liberty.[11] Because the arrest/deprivation was prior to any type of hearing, the plaintiff asserts, the defendants must have a legitimate reason for not providing a pre-deprivation hearing. See, e.g., Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (holding adequate post-deprivation hearings satisfy due process where pre-deprivation hearings are impractical).

It is well settled in this circuit that an arrest achieved of a person named under a valid warrant generally does not constitute a deprivation of any right guaranteed under the United States Constitution. Simons v. Clemons, 752 F.2d 1053, 1055 (5th Cir. 1985); Nesmith v. Taylor, 715 F.2d 194, 196 (5th Cir. 1983). A person under valid compulsion to appear in court does not state a viable deprivation of a liberty interest. Nesmith, 715 F.2d at 196. Chief Bell did not have a valid warrant to effectuate the arrest of Mr. Adair in this case. However, the arrest and its resultant compulsion to appear in court is not necessarily invalid. As long as an officer has probable cause for the arrest of a misdemeanor violation, a warrant is not required. Fields v. South Houston, 922 F.2d 1183, 1189 (5th Cir. 1991). The issue, then, is whether defendant Bell had probable cause to arrest Mr. Adair for violating the Junk Car Ordinance. This issue is more properly discussed in conjunction with the plaintiff's claim of false arrest and the court sees no need to do so here as well. See § III(C)(1),

[11] The court notes that this loss of liberty was limited in time because Adair was released from custody on his own recognizance.

infra. Consistent with the determination of this court on the issue of false arrest, this court finds that there are genuine issues of material fact as to this matter and summary judgment would be inappropriate.

In any event, regardless of whether this hearing was pre- or post- deprivation, this court must determine its sufficiency to decide if the plaintiff has a viable due process claim. An adequate hearing within the requirements of due process is a hearing which affords "[t]he opportunity to present reasons, either in person or in writing, why the proposed action should not be taken . . ." Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1495 (1985). This requirement assumes the presence of a fair and impartial hearing officer. Aside from the position that the hearing occurred post-deprivation, another of the plaintiff's serious contentions is that the conduct of the Municipal Judge Doxey on that day was improper. Primary among the complaints of the plaintiff in this regard is that Judge Doxey acted as both judge and prosecutor in this proceeding.[12] As this court has already noted, the defendants object to the use of this fact, but they do not deny it. While the Fifth Circuit has not addressed this issue, other federal courts have. It is a violation of a criminal defendant's due process rights for the presiding judge to also act in the role of prosecutor. Figueroa Ruiz v. Delgado, 359

[12] The plaintiff also charges that Judge Doxey levied a fine against him in excess of that allowed by the ordinance, and that the evidence (or lack of it) did not support his conviction under the provisions of the ordinance.

F.2d 718, 720 (1st Cir. 1966); United States v. James, 440 F.Supp. 1137, 1140 (D.Md. 1977); Pales De Mendez v. Aponte, 294 F.Supp. 311, 314 (D.P.R. 1969). As the court noted in Figueroa:

> [T]he judge [acting as both judge and prosecutor] must alternate roles in rapid succession, or even assume both at once . . . . The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men.

Figueroa, 359 F.2d at 720. This court has noted that the defendants have not disputed the fact that Judge Doxey acted as prosecutor in Mr. Adair's case. They have not explicitly conceded the fact, either. The extent to which the judge involved himself in prosecuting the case is important to determine if a party's due process rights have been violated. The mere fact that the judge, without conducting or actively guiding the prosecution, gives minimal assistance to the prosecution because the prosecutor is a layperson and not an attorney does not constitute a due process violation. United States v. Broers, 776 F.2d 1424, 1425 (9th Cir. 1985). Chief Bell was apparently present at this hearing, and the extent of his involvement at this trial is unknown to the court.

Chief Bell's actions resulting in any due process violations occurring at the trial could impose liability on the Town of Byhalia. However, the actions of Judge Doxey will not do so. "A municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker" for the purposes of municipal liability under § 1983. Johnson v. Moore, 958 F.2d 92, 94 (5th Cir. 1992); Bigford v. Taylor, 834 F.2d 1213,

1221-22 (5th Cir. 1988); Carbalan v. Vaughn, 760 F.2d 662, 665 (5th Cir. 1985). However, this rule does not apply to the administrative duties of a judge. Johnson, 958 F.2d at 94; Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980). The plaintiff has offered nothing, and the court finds nothing, to indicate that the actions of Judge Doxey were anything but judicial in nature. Further, the plaintiff has not named Judge Doxey in his official capacity as a defendant in this action, perhaps because of this fact. Regardless, there are genuine issues of material fact concerning the involvement of Chief Bell in the plaintiff's criminal trial which preclude a grant of summary judgment on this matter.

B. EQUAL PROTECTION

1. ORDINANCE AS A FACIAL VIOLATION OF EQUAL PROTECTION

This court does not reach the facial validity of the Byhalia Junk Car ordinance, for the plaintiff in his submissions to this court notes that he does not challenge the constitutionality of the ordinance on its face, but as applied. It must be noted that an arguably identical[13] ordinance was upheld on its face by the Fifth Circuit in Price v. Junction, 711 F.2d 582, 591 (5th Cir. 1983).

[13] There are important differences between the ordinance in Price and the one at bar, not the least of which is an exception for the operation of a licensed vehicle dealer or junkyard which is absent from the Byhalia ordinance. See Price, 711 F.2d at 587. Similarly, an exception for those vehicles completely enclosed in buildings and not visible from other properties is missing from the Byhalia ordinance. Id. As it stands, the Byhalia ordinance appears to substantially curtail the operation of some types of legitimate business operations within the city limits of Byhalia to a greater extent than the ordinance in Price.

2. SELECTIVE PROSECUTION

The plaintiff does contend, however, that his right to equal protection under the law was violated by discriminatory intent underlying his particular arrest for alleged violation of the Junk Car Ordinance. In raising this claim, the plaintiff puts upon himself a heavy burden because a government generally has broad discretion in determining who to prosecute. United States v. Sparks, 2 F.3d 574, 580 (5th Cir. 1993); United States v. Collins, 972 F.2d 1385, 1397 (5th Cir. 1992). It must be remembered that the "mere exercise of some selectivity by the government in instituting prosecutions is not itself a constitutional violation." Greene, 697 F.2d at 1234-35. The plaintiff must "demonstrate that the government selected or reaffirmed a particular course of action at least in part 'because of' - not merely 'in spite of' - its adverse effects upon a an identifiable group. Collins, 972 F.2d at 1397 (citing United States v. Ramirez, 765 F.2d 438, 439 (5th Cir. 1985)). Initially:

> To prevail on a selective prosecution claim, a [party] must first make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not . . . . If a [party] meets the first showing, he must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Home Depot, Inc. v. Guste, 773 F.2d 616, 626 (5th Cir. 1985) (quoting United States v. Greene, 697 F.2d 1229, 1234 (5th Cir.), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983)). The Fifth Circuit has recently reiterated this same

standard. Amato v. S.E.C., 18 F.3d 1281, 1285 (5th Cir. 1994). Once the plaintiff has satisfied both of these prongs, the government then must demonstrate that there was a legitimate basis for selecting the plaintiff for prosecution. Home Depot, 773 F.2d at 627; Greene, 697 F.2d at 1235.

In the case at bar, the plaintiff has presented adequate proof for a finder of fact to determine that he has met the first half of his prima facie case. The plaintiff is the only person ever to be convicted, or even arrested, for violation of the Junk Car Ordinance. Further, the plaintiff possesses and has submitted to the court photographic evidence of other violations within the town limits of Byhalia which have not been prosecuted. There exists a genuine issue of material fact as to this prong of the plaintiff's prima facie case in this matter. The plaintiff must now meet his burden as to the second prong in order to establish his case and survive summary judgment. As noted previously, in order to meet the second prong, the plaintiff must present proof that the prosecution "has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." Home Depot, 773 F.2d at 626. There is circumstantial evidence which indicates bad faith. Mr. Adair was visited prior to the enforceability of the Junk Car Ordinance by town officials because of the condition of his business property, including the presence of numerous automobiles. One of these visits occurred on December 15, 1992, where Adair was allegedly informed that he was in

violation of the Junk Car Ordinance, which had not yet been enacted by the Board of Aldermen. On the day that the ordinance did finally take effect, January 15, 1993, Adair was again personally warned that he was in violation of the ordinance. A short time after, on January 29, 1993, Mr. Adair became the first and only person to ever be arrested under the ordinance. The wheels of justice spun quickly in Byhalia that month, for Adair's guilt was determined at trial within five days of his arrest.

Notwithstanding this evidence of the "singling out" of Mr. Adair, it is not clear to this court that this intent was based on "impermissible considerations [such] as race, religion, or the desire to prevent his exercise of constitutional rights." There has been nothing presented to this court by any party regarding what particular impermissible consideration, if any, was utilized in the determination to arrest Mr. Adair. This court is fully cognizant of the burdens of the parties in this matter. However, in light of the absence of either evidence of argument from the parties on this point, it is the opinion of this court that the matter would be best resolved at a full trial on the merits of this case, and that summary judgment on this issue at this juncture would be unwise.

C. FOURTH AMENDMENT CLAIMS

1. FALSE ARREST

Through its incorporation into the Fourteenth Amendment, the Fourth Amendment requires that the States provide a fair and reasonable determination of probable cause before effectuating an

arrest on an individual. Baker v. McCollan, 443 U.S. 137, 142, 99 S.Ct. 2689, 2693, 61 L.Ed.2d 433, 440-41 (1979).

> Probable cause for arrest exists "when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant in a person of reasonable caution the belief that an offense has been or is being committed."

C-1 by P-1 v. City of Horn Lake, Miss., 775 F.Supp. 940, 945 (N.D. Miss. 1990) (quoting United States v. Fortna, 796 F.2d 724, 739 (5th Cir.), *cert. denied*, 479 U.S. 950, 107 S.Ct. 437, 93 L.Ed.2d 386 (1986)). A false arrest claim can arise under § 1983 if the arresting officer did not have probable cause for a warrantless arrest. Fields v. South Houston, 922 F.2d 1183, 1189 (5th Cir. 1991); Hand v. Gary, 838 F.2d 1420, 1424 (5th Cir. 1988). This court has dealt with the issue of false arrest before, and notes that the relevant standards are the same:

> In § 1983 cases where there is no conflict in the evidence, the determination of probable cause is one the court should make. Garris v. Rowland, 678 F.2d 1264, 1270 (5th Cir. 1982), *cert. denied sub nom.*, City of Forth Worth v. Garris, 459 U.S. 864, 103 S.Ct. 143, 74 L.Ed.2d 121 (1982). However, if the facts relied upon to show probable cause are in conflict, then the issue should be submitted to the jury. Id. at 1270. See also Canfield v. Chappel, 817 F.2d 1166, 1168 (5th Cir. 1987); Hindman v. City of Paris, 746 F.2d 1063, 1069 (5th Cir. 1984).

C-1, 775 F.Supp. at 945. It is incumbent upon this court, then, to determine if facts which support a finding (or lack of) probable cause are controverted in this case. This court finds that important facts relevant to the determination of probable cause are in controversy in this case, and should be decided by a trier of fact. The defendants state in their submissions to this court that

"[a]t the time Chief Bell arrested Adair, he had personal knowledge based upon his own observation that Mr. Adair had vehicles on his property in violation of Byhalia's Junk Car Ordinance." What specific facts led him to this knowledge is unclear to this court and is in dispute among the parties, for the plaintiff states that Bell had no such knowledge of particularized facts. The extent and amount of Bell's knowledge of specific facts pertaining to any violation of the Junk Car ordinance is highly determinative of whether sufficient probable cause existed to arrest Adair in this matter, and must be determined by a trier of fact before this issue may be resolved. The defendants are not entitled to a judgment as a matter of law on this claim.

2. ILLEGAL SEARCH

Adair contends that even if there was sufficient probable cause for his arrest, that the information giving rise to probable cause was obtained by Chief Bell through illegal means. Further, Adair charges that this illegal search is an independent violation of his civil rights. In particular, Adair charges that the visits to his business by Chief Bell and Trent Johnson on December 15, 1992 and January 15, 1993 were warrantless and therefore illegal searches in violation of the Fourth Amendment.

The defendants respond by stating that 1) Mr. Adair never objected to the presence of Bell and Johnson on his premises; and 2) the automobiles in question were in "plain view" and therefore observation of them does not constitute a "search" violative of the Fourth Amendment. As the plaintiff in a § 1983 action, Mr. Adair

has the burden of proving that the search was illegal, and that the "consent" and "plain view" exceptions to a warrant do not apply here. Crowder v. Sinyard, 884 F.2d 804, 826 (5th Cir. 1989).

a. ADAIR'S EXPECTATION OF PRIVACY

In order to justify protection from search under the Fourth Amendment, Mr. Adair must have had a reasonable expectation of privacy in the location of the automobiles in question. Katz v. United States, 389 U.S. 347, 360 (1967); United States v. McKeever, 5 F.3d 863, 866 (5th Cir. 1993). "The Fourth Amendment does not provide blanket protection against searches and seizures on private property. Rather, the Fourth Amendment protects those areas in which citizens have a reasonable expectation of privacy." McKeever, 5 F.3d at 866. Mr. Adair conducted a business which the court believes at least some part of was open for access by the general public. If a party leaves an item in a public place, he has abandoned any reasonable expectation of privacy in that item. United States v. Barlow, 17 F.3d 85, 87 (5th Cir. 1994). This court is of the opinion that leaving an item in a place readily accessible to the public is no different than leaving an item in a traditionally public place. The plaintiff cannot claim to have a legitimate expectation of privacy in items strewn about areas of his business which are openly accessible to the public. However, this court has not been apprised by the parties as to what portions, if any, of Mr. Adair's property the general public is not permitted access to. Nor is this court aware if the automobiles allegedly in violation of the ordinance were located in such a

place. Without these facts, this court cannot render a judgment as a matter of law on this issue.

b. PERMISSION TO SEARCH

The defendants have noted in their submissions to this court that Mr. Adair was present on each occasion that Bell and Johnson came to his place of business, and neither voiced an objection to their presence nor asked them to leave. The court takes these statements as implying that the defendants contend that Mr. Adair gave his implicit permission for the inspections and visual searches by Bell and Johnson. When analyzing an individual's consent to a search, two separate and distinct inquiries must be made: 1) whether the consent was voluntarily given, and 2) whether the search was within the scope of the consent. United States v. Rich, 992 F.2d 502, 505 (5th Cir. 1993). The determination of whether consent is knowingly and voluntarily given is a question of fact to be determined from viewing the totality of the circumstances surrounding the search. United States v. Coburn, 876 F.2d 372, 374 (5th Cir. 1989). There are many factors to be considered in this analysis. United States v. Oliver-Becerril, 861 F.2d 424, 426 (5th Cir. 1988); United States v. Zucco, 860 F.Supp. 363, 368 (E.D. Tex. 1994). Even if it is found that consent was given, it must be then determined if the scope of the consent was exceeded, by a standard of "objective" reasonableness - "What would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimena, 500 U.S. 248, 251, 111 S.Ct. 1801, 1803-04, 114 L.Ed.2d 297 (1991). The

court believes that the parties have insufficiently informed the court so that a proper determination can be made at this juncture and as stated, the determination of consent is a question of fact. As there exist questions of fact and there are likely relevant and undisputed facts not yet apparent to the court, this matter is inappropriate for resolution in a summary judgment context.

c. "PLAIN VIEW" DOCTRINE

An exception to the requirement of a warrant in order to seize property is the "plain view" doctrine. If a police officer is lawfully in a position which enables him to view an object, and the incriminating character of the object is immediately apparent, then that officer may seize the object without a warrant. Horton v. California, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112 (1990); United States v. Coleman, 969 F.2d 126, 131 (5th Cir. 1992); United States v. Mitchell, 832 F.Supp. 1073, 1076 (N.D. Miss. 1993). In the case at bar, however, there is no actual seizure of the property involved (i.e., automobiles). Mr. Adair has merely asserted that the warrantless viewing of this property on his business premises constitutes an illegal search.

> It is important to distinguish "plain view" . . . to justify seizure of an object, from a officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search [citations omitted], the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity.

Texas v. Brown, 460 U.S. 730, 75 L.Ed.2d 502, 511 n.4, 103 S.Ct. 1535 (1983). "Plain view" as applied to the case at bar is more

akin to the determination of Adair's expectation of privacy determination which this court has already addressed. Therefore, in that the present situation is based upon utilizing whatever he saw as a basis for probable cause and did not conduct a seizure of any property, the "plain view" doctrine does not itself offer any direction for this court in examining potential violations of the plaintiff's Fourth Amendment rights. Assuming that Chief Bell was otherwise legally present on the premises, there is no Fourth Amendment violation for using what he has seen in plain view as a basis for probable cause to arrest Mr. Adair. Whether Bell was legally present there and whether whatever he saw is sufficient to support a finding of probable cause has already been discussed in this opinion.

IV. QUALIFIED IMMUNITY OF CHIEF BELL

Whenever qualified immunity is asserted as an affirmative defense, resolution of the issue should occur at the earliest possible stage. Anderson v. Creighton, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987); Elliott v. Perez, 751 F.2d 1472, 1478 (5th Cir. 1985). Issues of qualified immunity are determined from the face of the pleadings and without extended resort to pre-trial discovery. Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994). Public officials, including law enforcement officers, are entitled to assert the defense of qualified immunity in a section 1983 suit for acts occurring in the course of their official duties. Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L.Ed.2d 396, 403 (1982); Gagne v. City of Galveston, 805 F.2d 558, 559 (5th Cir.

1986); Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986). Police officers are shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Davis v. Scherer, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019, 82 L.Ed.2d 139 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); White v. Walker, 950 F.2d 972, 975 (5th Cir. 1991); Morales v. Haynes, 890 F.2d 708, 710 (5th Cir. 1989). Stated differently, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

The first step in the inquiry of the defendant's claim of qualified immunity is whether the plaintiff has alleged the violation of a clearly established right. Siegert v. Gilley, 500 U.S. 266, 111 S. Ct. 1789, 114 L.Ed.2d 277, 287 (1991). This inquiry necessarily questions whether or not the officer acted reasonably under settled law in the circumstances which were confronted. Hunter v. Bryant, 502 U.S. 224, 112 S. Ct. 534, 116 L.Ed.2d 589, 596 (1991); Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." Blackwell v. Barton, 34 F.3d 298, 303 (5th Cir. 1994) (quoting Pfannstiel v. Marion, 918 F.2d 1178, 1183 (5th Cir. 1990)). Even if he violated Adair's

constitutional rights, he is entitled to immunity if his actions were objectively reasonable. Blackwell, 34 F.2d at 303.

This circuit has employed a "heightened pleading" requirement whenever the defense of qualified immunity has been alleged. Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985). The United States Supreme Court struck down this requirement as applied toward municipalities, noting that "municipalities do not enjoy immunity from suit - either absolute or qualified - under § 1983." Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. ---, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517, 523 (1993). Considering an express reservation contained in the Leatherman opinion, the Fifth Circuit has declined to retreat from the continued application of the "heightened pleading" standard applied to individual government officials pleading qualified immunity. Babb, 33 F.3d at 477. Therefore, in order for Adair to overcome Bell's assertion of qualified immunity, he must have "state[d] with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of qualified immunity." Elliott, 751 F.2d at 1473. In the case at bar, this means that Adair must have alleged sufficient facts from which it can be discerned that no reasonable officer would have believed that he could have lawfully acted in the manner Bell did with regard to each of the plaintiff's claims. Based on the facts alleged in the matters submitted, it is the opinion of this court that Adair has sufficiently alleged facts to circumvent summary judgment on

immunity grounds. Adair has asserted intentional wrongful action on the part of Bell, as well as Bell's inability or outright failure to discern facts necessary to determine the lawfulness of his own actions in these matters. Any reasonable officer would not intentionally violate the rights of a citizen, and would also undertake reasonable efforts to determine the lawfulness of his actions. Sufficient facts are unavailable to the court to properly determine any immunity available to the defendant Bell. Adair has sufficiently stated claims which could, if true, establish liability on the part of Harold Bell.

CONCLUSION

There exist in this case genuine issues of material fact, the defendants are not entitled to a judgement as a matter of law, and the plaintiff has sufficiently alleged facts to meet the heightened pleading requirements placed upon him. Therefore, the defendants' motion for an entry of summary judgment will be denied.

A separate order in accordance with this opinion shall issue this day.

THIS, the _____ day of January, 1995.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JOHN ADAIR d/b/a A & B AUTOMOTIVE — PLAINTIFF

vs. — Civil Action No. 3:93cv132-D-D

HAROLD BELL, individually
and in his official capacity
as Chief of Police, and the
TOWN OF BYHALIA, MISSISSIPPI — DEFENDANTS

ORDER DENYING SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the defendants' motion for summary judgment is hereby DENIED.

2) the plaintiff's motion for partial summary judgement on liability is DENIED.

All memoranda, depositions, affidavits and other matters considered by the court in denying the defendants' motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this the _____ day of January, 1995.

_____

United States District Judge